NO. 21637

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

LESLIE EUGENE LONGACRE,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

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APPELLEE'S BRIEF

APPEAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

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TOPICAL INDEX

Page

Table of Authorities ii

I JURISDICTIONAL STATEMENT 1

II STATUTE INVOLVED 2

III QUESTIONS PRESENTED 3

IV STATEMENT OF THE FACTS 3

V ARGUMENT 4

A. THE APPELLANT WAS PROPERLY CHARGED WITH VIOLATION OF TITLE 18, UNITED STATES CODE, SECTION 2113(a), ATTEMPTED BANK ROBBERY. 4

B. THE SENTENCE IMPOSED ON APPELLANT IS WITHIN THE LIMITS SET BY THE STATUTE AND DOES NOT CONSTITUTE A CRUEL AND UNUSUAL PUNISHMENT. 5

C. THE ATTEMPT PROVISION OF SECTION 2113(a) IS NOT VOID FOR VAGUENESS. 6

CONCLUSION 7

CERTIFICATE 8

TABLE OF AUTHORITIES

Cases	Page
Prince v. United States, 352 U.S. 322 (1956)	5
Roberts v. United States, 331 F.2d 502 (1964)	5
United States v. Cohen, 177 F.2d 523 (2nd Cir. 1949), cert. denied 70 S. Ct. 568	6
Statutes	
Title 18, United States Code, §472	5
Title 18, United States Code, §495	5
Title 18, United States Code, §2113	2
Title 18, United States Code, §2113(a)	1, 2, 3, 4, 5, 6
Title 18, United States Code, §3231	2
Title 18, United States Code, §4208(a)(2)	2, 5
Title 28, United States Code, §1294(1)	2
Rules	
Federal Rules of Criminal Procedure	
Rule 37(a)	2
Texts	
Black's Law Dictionary (4th Edition, 1951)	6

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APPELLEE'S BRIEF

I

JURISDICTIONAL STATEMENT

On November 23, 1965 the Federal Grand Jury for the Central Division of the Southern District of California returned an indictment in one count charging appellant with violation of Title 18, United States Code, Section 2113(a). The indictment alleged that appellant, by force and violence and by intimidation, knowingly and wilfully attempted to take from Bette Johnstone, teller, money belonging to the Bank of America, Clarendon Pacific Branch, Huntington Park, California [CT 2]. 1/

1/ "C. T." refers to Clerk's Transcript.

On November 29, 1965 defendant was arraigned and plead not guilty [CT 3].

On December 13, 1965 defendant appeared before the Honorable Peirson M. Hall, United States District Judge and waived trial by jury [CT 10]. A court trial before Judge Hall was begun on December 14, 1965 and the defendant was found guilty as charged on that day [CT 9].

On January 10, 1966 the defendant was adjudged convicted upon his plea of not guilty and verdict of guilty and sentenced to the custody of the Attorney General for a period of 20 years [CT 11]. The Court specified that the prisoner may become eligible for parole at such time as the Board of Parole may determine, pursuant to Title 18, United States Code, Section 4208(a)(2). On January 15, 1966 defendant filed a timely notice of appeal.

Jurisdiction of the District Court was based on Title 18, United States Code, Sections 2113 and 3231. Jurisdiction of this Court is based on Title 28, United States Code, Section 1294(1) and Rule 37(a) of the Federal Rules of Criminal Procedure.

II

STATUTE INVOLVED

Title 18, United States Code, Section 2113(a), provides in pertinent part as follows:

> "Whoever, by force and violence, or by intimidation, . . . attempts to take, from the person

> or presence of another any property or money or any other thing of value belonging to, or in the care, custody, control, management, or possession of, any bank, or any savings and loan association . . . ."

shall be guilty of an offense.

III

QUESTIONS PRESENTED

1. Whether the appellant was properly charged with violation of Title 18, United States Code, Section 2113(a), attempted bank robbery.

2. Whether the lawful sentence imposed is a cruel and unusual punishment.

3. Whether the attempt provision of Section 2113(a) is void for vagueness.

IV

STATEMENT OF THE FACTS

Shortly before 1:00 p.m. on November 10, 1965 appellant entered the Bank of America, Clarendon Pacific Branch, Huntington Park, California. He stepped up to Teller Bette Johnstone's window, laid a brown envelope on the counter and said, "This is a holdup" [R. T. 8]. [2] Miss Johnstone testified that she is quite sure

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[2] "R. T." refers to Reporter's Transcript.

the defendant did not say "What is the holdup" [R. T. 13].

The teller immediately ran to the next teller and screamed "Joe", directing her scream to bank operations officer, Joe Joslyn [R. T. 8-9].

A customer heard the teller's shouts and saw the appellant start out the door [R. T. 15]. He and the operations officer followed the defendant outside the bank. The defendant stopped and pointed a gun at them which resembled Government's Exhibit Number One [R. T. 17, 18, 33]. The defendant turned and ran down an alley, down another street, and was finally captured by the pursuing customer [R. T. 19-20]. During the chase the defendant paused at his car which was parked nearby occupied by his wife [R. T. 57]. A toy gun, Government's Exhibit Number One, had been on the floorboard of the defendant's automobile [R. T. 50].

V

ARGUMENT

A. THE APPELLANT WAS PROPERLY CHARGED WITH VIOLATION OF TITLE 18, UNITED STATES CODE, SECTION 2113(a), ATTEMPTED BANK ROBBERY.

Appellant apparently claims that the appellant should have been charged with entering a bank with intent to commit a felony, rather than attempted bank robbery. Nowhere in appellant's brief is there support for such a contention. The evidence produced by the prosecution at trial clearly established the appellant's guilt of

the charged offense; the appellant does not claim the evidence to be legally insufficient. Prince v. United States, 352 U.S. 322 (1956), cited by appellant, only stands for the proposition that the unlawful entry offense merges with a completed bank robbery and a defendant cannot be sentenced on both charges. The opinion cannot be cited for the proposition that attempted bank robbery does not constitute an offense. Roberts v. United States, 331 F. 2d 502 (1964) (Appellant's Brief, page 3), held only that Title 18, United States Code, Section 495 does not make it an offense to attempt to utter and publish, which it does not, and that certain indictment language did not charge an offense under Title 18, United States Code, Section 472. The case is inapplicable both to the statute and the case under consideration herein.

B. THE SENTENCE IMPOSED ON APPELLANT IS WITHIN THE LIMITS SET BY THE STATUTE AND DOES NOT CONSTITUTE A CRUEL AND UNUSUAL PUNISHMENT.

The appellant received a sentence of twenty years under Section 2113(a) and 4208(a)(2) thereby allowing full discretion to the Federal parole authorities in the matter of the length of time the appellant would serve in confinement. In view of all the facts before the trial court, including the appellant's prior record [R. T. 51 and 80] the sentence cannot be considered "cruel and unusual". Since the sentence does not exceed the maximum possible sentence under Section 2113(a), it is not open to attack as an illegal sentence.

United States v. Cohen, 177 F.2d 523, 525 (2nd Cir. 1949), cert. denied 70 S. Ct. 568.

Appellant argues, without any supporting authority, that it is illegal that an attempt should carry with it the same possible maximum sentence as the completed offense of bank robbery. Such a contention is supported neither by logic nor by the cases. The mere fact that circumstances prevent a criminal from carrying out his plans in no way reduces his culpability or the gravity of the offense.

C. THE ATTEMPT PROVISION OF SECTION 2113(a) IS NOT VOID FOR VAGUENESS.

The final alleged error which may be sifted from appellant's brief is that the attempt provision of Section 2113(a) is void for vagueness. While there is no general attempt statute in the United States Code statutes setting forth attempts as a separate offense, attempt violations are common to both state and federal law. The standard definition of an attempt is well stated in Black's Law Dictionary (4th Edition, 1951).

Attempt. In Criminal Law "An effort or endeavor to accomplish a crime amounting to more than mere preparation or planning for it, which if not prevented would have resulted in the full consummation of the act attempted, but which, in fact, does not bring to pass the party's ultimate design."

The statute in question only limits the standard definition by

the provision that the attempt involve force and violence, or intimidation.

CONCLUSION

For the reasons herein stated, the appellant's conviction should be affirmed.

Respectfully submitted,

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CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

/s/ Michael D. Nasatir
MICHAEL D. NASATIR